

of defence has yet been filed and therefore the defendant's defence is unknown. I was merely asked to try the issues on affidavits. Two things struck me from the statement of claim and the arguments. Apart from other factors one important question which may have to be tried is whether or not there has been a waiver by the plaintiff of clause 5 (i.e. that time was of the essence) by the plaintiff's subsequent conduct. If the plaintiff had treated time as being of the essence it seemed strange that he should have agreed to negotiate settlement. The other question may concern the 'forfeiture of deposit' clause. At this stage of the proceedings I am not prepared to say that there are no substantial questions to be tried.

Accordingly the application will be refused with costs. Defendant shall have unconditional leave to defend.

Application refused.

Solicitors: *Allen & Gledhill; M. Abraham.*

SIME DARBY LTD. v. PORT SWETTENHAM AUTHORITY

[O.C.J. (Ong Hock Thye F.J.) March 30, 1966]

[K.L. — Civil Suit No. 530 of 1964]

Bailment — Goods discharged from ship into custody of port authority — Loss of goods — Whether loss arose from actual fault or privity of port authority — Port Swettenham Tariff Book, Regulation 16 — Port Authorities Act, 1963.

The plaintiffs claimed damages arising from the defendants' failure to deliver some cases of whisky which were discharged from a vessel into the custody of the defendants as bailees for reward for delivery to the plaintiffs' licensed warehouse. The goods were lost and the evidence showed they had been lost during carriage from the ship to the wharf of the defendants. The defendants admitted that they were bailees for reward but contended (a) that they had not entered into any contract with the plaintiffs but had accepted the goods subject to the port regulations and the terms and conditions of the relevant bills of lading; (b) that the loss was not due to any neglect or default on their part and (c) that in any event their liability was limited by the port regulations.

Held: (1) there was in fact an express contract between the plaintiffs and the defendants as evidenced by the delivery orders and the consignment notes;

(2) the loss of the goods in this case was due to negligence on the part of the defendants' servants in leaving valuable pilferable goods untended;

(3) as the defendants were not a party to the bill of lading they could not rely on any clause in the bills of lading;

(4) the loss of goods in this case was due to the negligence of the defendants' servants in that they were remiss in the performance of routine duties, and therefore there was no "actual fault or privity" on the part of the defendants within the meaning of regulation 16 of the Port Swettenham Tariff Book No. 1 and their liability was therefore limited under the regulations.

A Cases referred to:—

(1) *J. Spurling Ltd. v. Bradshaw* [1956] 2 All E.R. 121 at p.125.

(2) *Dunlop Pneumatic Tyre Co. Ltd. v. Salfridge & Co. Ltd.* [1915] A.C. 847.

(3) *Wilson v. Darling Island Stevedoring Co. Ltd.* (1955-56) 95 C.L.R. 43.

B (4) *Midland Silicones Ltd. v. Scruttons Ltd.* [1959] 2 Q.B. 171, affirmed by H.L. [1962] A.C. 446.

(5) *The Lady Gwendolen* [1965] 3 W.L.R. 91.

(6) *Lennard's Carrying Co. v. Asiatic Petroleum Co. Ltd.* [1914] 1 K.B. 419, 432.

(7) *Bolton (H.L.) Engineering Co. Ltd. v. T.J. Graham & Sons Ltd.* [1957] 1 Q.B. 159, 172, 173.

C CIVIL SUIT.

M. Shankar for the plaintiffs.

S. D. K. Peddie (J. Puthucheary with him) for the defendants.

Cur. Adv. Vult.

D **Ong Hock Thye F.J.:** The plaintiffs' claim is for \$24,853.19 damages suffered by reason of the defendants' failure to deliver to them as consignees 188 cases of Dewar's whisky, which were discharged from the vessel *Laomedon* into the custody of the defendants, as bailees for reward, at Port Swettenham on December 17, 1963 for delivery to the plaintiff's licensed warehouse at Port Swettenham.

The defendants by their defence admit that they were bailees for reward. They contend first, however, that they did not enter into any contract with the plaintiffs, but accepted the goods from the *Laomedon* subject to regulations 15, 16 & 17 of the Port Swettenham Tariff Book No. 1 and the terms and conditions of the relevant bills of lading. Secondly, they deny that the loss was due to any neglect or default on their part which rendered them liable to pay damages. Thirdly, they contend that in any event their liability is limited by regulation 16 of the tariff book to the sum of only \$1,706.85, calculated on the tonnage of the lighter used for the carriage of the goods lost.

H By their reply the plaintiffs join issue with the defendants on their defence and claim that the defendants are, in any event, liable in tort, if not in contract.

I An admission of facts was filed herein under R.S.C. Order 32, rule 7, and an agreed bundle of documents put in by consent. In addition, twelve witnesses were called by the plaintiffs for the purpose of proving their title to the goods, their contractual relationship with the defendants and the manner in which the goods were handled, after coming into the defendants' custody, until they were missed. Except for one witness, who was questioned on a point which in no way affects the defendants' liability as bailees for reward,

all the plaintiffs' witnesses were not cross-examined. The defendants elected to call no evidence. In the result the evidence of the plaintiffs stands unchallenged.

The facts thus established were as follows. In October 1963 the plaintiffs' London agents, Shaw Darby & Co. Ltd., purchased and shipped 380 cases of whisky to the plaintiffs by the *Laomedon*, at the same time forwarding to the plaintiffs the bills of lading and invoices. The plaintiffs were named as consignees in the ship's manifest. In due course, before the arrival of the ship, the plaintiffs handed to the defendants two delivery orders, which were issued by the shipping agents to the plaintiffs as consignees, together with two corresponding consignment notes, instructing the defendants to deliver the goods to the plaintiffs' licensed warehouse at the Sime Darby Old Siding, Port Swettenham, the plaintiffs undertaking to pay the defendants' charges. On December 20, 1963, the goods in question were discharged from the *Laomedon* into the defendants' lighters, one of which bore the No. S. 66. The lighter was towed to the defendants' wharf No. 8. Its hatches were not locked by the chief tally clerk, the defendants' servant, (who should have seen to it in accordance with standing orders contained in Working Instruction No. 255) and, although he told the wharf foreman and cargo superintendent that this particular lighter, S. 66, contained liquor which had not been locked up, no precautions against pilferage were taken either by way of early removal of the cargo into the warehouse or seeing that the lighter was adequately guarded. The following morning, a lighterman in the defendants' employ discovered this lighter missing from its berth and reported the fact to a chief tally clerk — not the one who had supervised the discharge of cargo from the *Laomedon* — but the latter apparently did nothing about it, and responsible officers of the port authority were unaware that anything was amiss till two days later, December 23. It is clear that the lighter had been surreptitiously towed away from wharf No. 8 while left unguarded during the night of December 20-21 and the cargo stolen. In the agreed bundle are 8 pages of evidence recorded in the Klang magistrate's court at the trial of a person charged with the theft*. The defendants have never offered any explanation for their inability to deliver 188 of the 380 cases of whisky which came into their possession as bailees for reward.

Turning now to the defence, that there was no contract between the plaintiffs and defendants, I have no doubt in my mind that there was in fact an express contract. The defendants' con-

attention is a little surprising in view of their admission Nos. 33 to 36, relating to the delivery orders, in the admission of facts, the admission in the defence that they were bailees for reward and the evidence given at the trial of this action. The consignment notes accompanying the delivery orders, in my view, afford indisputable evidence of the contract, containing as they do, instructions given by the plaintiffs, as owners of the goods, to the defendants to discharge the same from the ship for delivery to the plaintiffs' warehouse at the usual charges which the plaintiffs undertook to pay. The defendants, having accepted these instructions, performed what they had held themselves out as ready and willing to do, for the consideration published in their tariff book, in respect of 192 cases of whisky. Was not the undelivered portion of the consignment part and parcel of the same contract? The fact that they were not involuntary bailees who had had goods offloaded into their custody without their consent refutes their contention completely. In this connection the fact that the consignment notes were those formerly used by the Railway Administration, the defendants' predecessor, is quite irrelevant.

In view of the established facts, I do not consider it necessary to labour the other contentions in the defence. The plaintiffs have stated their claim in an unexceptionable manner. What follows then has been stated by Denning L.J. (as he then was) in *J. Spurling Ltd. v. Bradshaw*:⁽¹⁾

"A bailor, by pleading and presenting his case properly, can always put the burden of proof on the bailee. In the case of non-delivery, for instance, all he need plead is the contract and the failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exempting clause".

I hold that the loss here was due to negligence on the part of the defendants' servants in leaving valuable pilferable goods untended. This summarily disposes of their second ground of defence.

As regards exemption clauses the defendants, in my opinion, are disentitled to avail themselves of any such as were contained in the bills of lading, merely by reason of the fact that the delivery orders to the defendants were expressed as being "subject to the terms and conditions of the bill of lading covering this cargo." The shipping agents, in issuing the delivery orders, were acting only as agents for the Blue Funnel Line and not, I should emphasise, as agents for the plaintiffs, the consignees. The defendants, therefore, cannot rely on any clause in the bill of lading, not being a party to the contract. This, of course, is in accordance with the fundamental principle enunciated in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*,⁽²⁾ which was followed by the High Court of Australia in

* *Gurusamy v. Public Prosecutor*, [1965] 1 M.L.J. 245.

Wilson v. Darling Island Stevedoring Co. Ltd.⁽³⁾ and by Diplock J. (as he then was) in *Midland Silicones Ltd. v. Scruttons Ltd.*,⁽⁴⁾ a decision affirmed by the House of Lords. In the words of Lord Reid:

"Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provisions in it was intended to benefit him."

It is therefore needless for me to dwell any longer on exemption clauses in the bills of lading.

Finally I turn to regulations 15, 16 and 17 of the Port Swettenham Tariff Book No. 1 relied on by the defendants for repudiating or limiting their liability.

The defence based on regulation 15 was abandoned and need not concern us any further. As regulation 17 is restricted to contracts for transportation only by water and the contract in this case includes transport overland by road or railway to the plaintiffs' licensed warehouse at the old siding, it clearly has no application. Hence only regulation 16 remains for consideration. Entitled "Liability in respect of transportation partly by rail or road and partly by water" it exempts the defendants from responsibility for loss or damage "from act of God, acts of war or of enemies of the Federation of Malaya, or fire, explosion" etc., but, subject to that condition, they are responsible for any loss of or damage to goods which may, *without its actual fault or privity*, happen during the carriage by water to the extent of an aggregate amount not exceeding \$60 for each ton of the vessel used.

I find as a fact that the plaintiffs' whisky was lost during carriage by water. It had not been offloaded from lighter to wharf or warehouse when the lighter was towed away by thieves. I further find that the loss would not have occurred but for the negligence of the defendants' servants in failing to take necessary precautions against removal of the lighter and theft of its cargo.

Thus baldly stated, the only question to be resolved in this case is whether the loss of the whisky arose without "actual fault or privity" on the part of the defendants, whose liability would then be limited, or whether such loss was caused or contributed to by their actual fault or privity, in which event there would be no limitation of liability in accordance with regulation 16. On this point I shall content myself by referring to the most recent authority: *The Lady Gwendolen*,⁽⁵⁾ the facts of which are briefly set out in the headnote as follows:

"The m.v. *The Lady Gwendolen*, owned by the plaintiffs, whose principal activity was brewing, collided with and sank the defendants' vessel *Freshfield*, which was lying at anchor in the river Mersey. The collision occurred in very thick fog, with *The Lady Gwendolen*,

which was fitted with radar, going at full speed. The radar was switched on and working but it was not being continuously manned, the master merely glancing at it occasionally, so that it was not being effectively used. The master, who admitted in evidence that he had habitually navigated in fog at excessive speed, was given no instructions as to the use or misuse of radar and the plaintiffs took no step to draw his specific attention to, or emphasise the importance of, Ministry of Transport notice M.445, of December, 1960, relating to navigation with radar in reduced visibility. Although all the ship's logs were regularly submitted to the marine superintendent, he had failed to observe the master's practice of going at excessive speed in fog, even though that fact was apparent from a simple examination of the engine room records and dock logs. Neither the assistant managing director in charge of the traffic department nor the traffic manager displayed any interest in navigational matters, and they were content to leave all such matters to the marine superintendent. Consequently the master's practice of going at excessive speed in fog was never detected, and he was never warned of the gravity of the risks inherent in it. In an action by the plaintiffs, who admitted liability for the collision but claimed to limit their liability under section 503 of the Merchant Shipping Act, 1894, on the ground that the collision occurred without their actual fault or privity, Hewson J. found that the plaintiffs' failure to consider or appreciate the navigational problems posed by the use of radar, and consequent failure to impress on the master the gravity of the risks he was running, contributed to the collision. He, therefore, held that they were guilty of actual fault and refused a decree of limitation of liability."

On appeal it was held by the Court of Appeal that it was the duty of a reasonably prudent shipowner (a) to appreciate the navigational problems posed by the use of radar in fog, (b) to impress the urgency of those problems upon his masters, and (c) to take steps to ensure that they navigated his ships safely in fog, more particularly when the ships were fitted with radar; that the plaintiffs had failed to perform their duty in each of the above three respects, and their breach of that duty had contributed to the collision; and that, therefore, they were guilty of actual fault, and accordingly, were not entitled to limit their liability.

In that case Willmer L.J. quoted Buckley L.J. who said in *Lennard's Carrying Co. v. Asiatic Petroleum Co. Ltd.*⁽⁶⁾ as follows:

"The words 'actual fault or privity' in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants and agents."

Willmer L.J. then went on:

"I think it is necessary to examine in detail the facts of each particular case in order to see what in fact the shipowners did, or omitted to do, which could fairly be said to constitute actual fault on their part. Where, as here, the shipowners are a limited company, it is almost inevitable that difficult questions will arise. It is necessary to look closely at the organisation of the company in order to see of what individual it can fairly be said that his act or omission is that of the company itself."

I shall quote only one more passage from the same judgment, at p. 107:

"Useful guidance on how the mind and will of a company may be manifested is also to be found in the judgment of Denning L.J. in *Bolton (H.L.) Engineering Co. Ltd. v. T. J. Graham & Sons Ltd.*⁽⁷⁾ where he said: A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So that you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* A little later Denning L.J. said: 'So here, the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case'."

In the instant case the negligence which occasioned the loss may fairly be described as remissness in the performance of routine duties by the chief tally clerk, the wharf foreman and perhaps the watchman or guards on night duty at the wharf. A spate of goods being landed at the relevant time to meet the demands of the Christmas, Chinese New Year and Hari Raya celebrations doubtless accounted for relaxation from strict routine precautions. Once these facts are appreciated I do not think the difficulty arises (as it did in *The Lady Gwendolen* and other cases referred to therein) of drawing the line between the fault or privity of somebody who is merely a servant or agent for whom the company is liable on the footing of *respondent superior* and the fault or privity of one whose action is the very action of the company itself, to paraphrase what Lord Haldane said in *Lennard's* case. Consequently, I think the defence of limitation of liability succeeds.

In this connection I am of the opinion that regulation 16 has not been repealed by section 57 of the Port Authorities Act, 1963. The proviso to that section is not happily worded; nevertheless, the reference to "tariffs and charges" only in the latter part thereof does not, in my view, have the effect, as it were, of erasing the word "regulations" appearing earlier in the same proviso.

One minor problem, however, now arises which I think was due to oversight. In the further and better particulars of paragraphs 2 of the defence it was stated that the lighter No. S. 66 had a tonnage of 60 tons and that the total of claims received in connection with the theft of cargo therefrom amounted to \$63,129.27, with the result that the plaintiffs would be entitled to a sum of \$1,706.85 only on calculation. The

A plaintiffs had joined issue with the defendants on their defence and there was neither admission by the plaintiffs nor proof by the defendants of the tonnage of the lighter and the aggregate of claims they received. The onus, of course, lay with the defendants when they relied on regulation 16.

B I am, therefore, compelled to do the best I can in the circumstances when it comes to assessment of the quantum of damages. The Port Swettenham Tariff Book No. 1 was referred to by both parties. On page 27, the subject of which was lighter hire and demurrage, only two types of lighters were specified, one of 60 tons and the other 100 tons. I think it is but fair to take the latter, since the fault lay with the defendants in failing to prove the tonnage of S. 66. There is no evidence whatsoever on the other alleged claims. In the result judgment will be entered for the plaintiffs in the sum of \$6,000, at the rate of \$60 per ton for 100 tons, interest at 6% from December 23, 1963 and costs.

Judgment for the plaintiffs.

Solicitors: *Shearn, Delamore & Co.; Skrine & Co.*

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LIM TING HONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Winslow J.) April 4, 1966]

[Singapore — Magistrates Appeal No. 85 of 1965]

F *Societies — Triad society — Possession of writings relating to — Evidence of expert — Societies Ordinance (Cap. 228), s. 16(2).*

The appellant was found guilty of possession of writings relating to a triad society. The expert gave evidence that the poems found in the possession of the appellant related to the *Ang Bin Hoay* triad society. On appeal it was contended that the evidence should have been analysed by the district judge and as he had failed to do so, the conviction should be set aside.

G Held: this was a pure and simple case of possession and on the facts the district judge had found that the appellant was in possession of the poems, which were shown to relate a triad society, and therefore the appellant was correctly convicted.

Case referred to:—

H (1) *Tan Ah Leng v. R.* [1957] M.L.J. 36.

CRIMINAL APPEAL.

Kumar Lal for the appellant.

P. Ganesan (Deputy Public Prosecutor) for the respondent.

I Winslow J.: The appellant was originally charged in 2nd Criminal District Court Case No. 164 of 1964 with being found to possess writings relating to a triad society, an offence punishable under section 16(2) of the Societies Ordinance (Cap. 228) (hereinafter referred to as "the Ordinance"), and secondly with being a member of an unlawful society, an offence punishable